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08                   UNITED STATES DISTRICT COURT  
09                   WESTERN DISTRICT OF WASHINGTON  
10                   AT SEATTLE

11       VERNA MCDONOUGH,    ) Case No. C06-1571-RSL-JPD  
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16       Plaintiff Verna McDonough appeals the final decision of the Commissioner of the  
17 Social Security Administration (“Commissioner”), which denied plaintiff’s application for a  
18 period of disability and Disability Insurance Benefits (“DIB”) under Title II of the Social  
19 Security Act, 42 U.S.C. § 401 *et seq.* (“the Act”), after a hearing before an Administrative  
20 Law Judge (“ALJ”). For the reasons set forth below, the Court recommends that the  
21 Commissioner’s decision be REVERSED and REMANDED for further proceedings not  
22 inconsistent with the Court’s instructions.

23    I. FACTS AND PROCEDURAL HISTORY

24       Plaintiff is a fifty-six year-old woman with a high school education. Administrative  
25 Record (“AR”) at 55, 81. Plaintiff has previously worked as a school bus driver, receptionist,  
26 pizza delivery driver, cashier, and was self-employed to use her dog to clear geese from private

01 property. AR at 66. Plaintiff was last gainfully employed in 2002. AR at 75.

02 On April 23, 2003, plaintiff applied for SSI benefits based on physical impairments,  
03 alleging an onset date of March 1, 2002. AR at 75. Plaintiff asserts that muscle spasms and  
04 chronic pain associated with fibromyalgia have kept her from maintaining employment of any  
05 kind. AR at 75.

06 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 26,  
07 30. On April 1, 2005, a disability hearing was held before the ALJ, who eventually concluded  
08 that plaintiff was not disabled and denied benefits based on his finding that plaintiff's past  
09 relevant work did not require the performance of work-related activities precluded by her  
10 residual functional capacity ("RFC"). AR at 23. Plaintiff's administrative appeal of the ALJ's  
11 decision was denied by the Appeals Council, AR at 5-7, making the ALJ's ruling the "final  
12 decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On November 1,  
13 2006, plaintiff timely filed the present action challenging the Commissioner's decision. Dkt.  
14 No. 3.

## 15 II. JURISDICTION

16 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
17 405(g) and 1383(c)(3).

## 18 III. STANDARD OF REVIEW

19 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
20 social security benefits when the ALJ's findings are based on legal error or not supported by  
21 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
22 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
23 such relevant evidence that a reasonable mind might accept as adequate to support a  
24 conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881  
25 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, settling  
26 conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews*

v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to meticulously examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence on record is susceptible to more than one rational interpretation, it is the Commissioner's conclusions that must be upheld. *Id.*

#### IV. EVALUATING DISABILITY

As the claimant, Ms. McDonough bears the burden of proving that she is disabled within the meaning of the Social Security Act ("the Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. § 423(d)(2)(A); see also *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five-step sequential evaluation for determining whether a person is disabled within the meaning of the Act. See 20 C.F.R. § 404.1520. The claimant bears the burden of proof during steps one through four. At step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled or not disabled at any step in the sequence, the inquiry ends without need to consider subsequent steps.

Step one asks whether the claimant is presently engaged in "substantial gainful activity." 20 C.F.R. § 404.1520(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the Commissioner proceeds to step two. At step two, the claimant must establish that she has one

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<sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

01 or more medically severe impairments, or combination of impairments, that limit her physical  
02 or mental ability to do basic work activities. If the claimant does not have such impairments,  
03 she is not disabled. 20 C.F.R. § 404.1520(c). If the claimant does have a severe impairment,  
04 the Commissioner moves to step three to determine whether that impairment meets or equals  
05 any of the listed impairments described in the regulations. 20 C.F.R. § 404.1520(d). A  
06 claimant whose impairment meets or equals a listing for the twelve-month duration  
07 requirement is disabled. *Id.*

08 When the claimant's impairment neither meets nor equals one of the impairments listed  
09 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's  
10 residual functional capacity ("RFC"). 20 C.F.R. § 404.1520(e). Here, the Commissioner  
11 evaluates the physical and mental demands of the claimant's past relevant work to determine  
12 whether she can still perform that work. *Id.* If the claimant is able to perform her past relevant  
13 work, she is not disabled; if the opposite is true, the burden shifts to the Commissioner at step  
14 five to show that the claimant can perform some other work that exists in significant numbers  
15 in the national economy, taking into consideration the claimant's RFC, age, education, and  
16 work experience. 20 C.F.R. § 404.1520(f). If the Commissioner finds the claimant is unable  
17 to perform other work, the claimant is disabled and benefits may be awarded.

## 18 V. DECISION BELOW

19 On June 2, 2005, the ALJ issued a decision denying plaintiff's request for a period of  
20 disability and DIB, which found:

- 21 1. The claimant meets the nondisability requirements for a period of  
22 disability and Disability Insurance Benefits set forth in Section 261(i) of  
the Social Security Act and is insured for benefits through the date of  
this decision.
- 23 2. The claimant has not engaged in substantial gainful activity since the  
alleged onset of disability.
- 24 3. The claimant's degenerative disc disease and fibromyalgia, are  
considered "severe" based on the requirements in . . . [Regulation] 20  
CFR § 404.1520(c).

- 01 4. These medically determinable impairments do not meet or medically  
02 equal one of the listed impairments in Appendix 1, Subpart P,  
03 Regulation No. 4.
- 04 5. The undersigned finds the claimant's allegations regarding her  
05 limitations are not totally credible for the reasons set forth in the body of  
06 the decision.
- 07 6. The claimant has the residual functional capacity to lift and/or carry 10  
08 pounds occasionally and less than 10 pounds frequently, stand and/[or]  
09 walk for 2 hours in an 8-hour day and sit for 6 hours in an 8-hour day.  
10 Additionally, the claimant is limited to occasional climbing ramps and  
11 stairs, stooping, crouching and crawling but is precluded from climbing  
12 ladders, ropes and scaffolds. She also has limited ability to reach  
13 overhead with both upper extremities. Further, she should avoid  
14 concentrated exposures to hazards such as machinery and heights.
- 15 7. The claimant's past relevant work as a receptionist did not require the  
16 performance of work-related activities precluded by her residual  
17 functional capacity (20 CFR § 404.1565).
- 18 8. The claimant's medically determinable degenerative disc disease and  
19 fibromyalgia do not prevent the claimant from performing her past  
20 relevant work.
- 21 9. The claimant was not under a "disability," as defined in the Social  
22 Security Act, at any time through the date of this decision (20 CFR §  
23 404.1520(f)).

AR at 22-23.

## VI. ISSUES ON APPEAL

There are three primary allegations of error:

1. Did the ALJ Err in Assessing the Plaintiff's Credibility and Testimony  
2. Regarding Her Pain Level?
3. Did the ALJ Fail to Provide Legally Sufficient Reasons for Rejecting the  
Medical Opinion Evidence of Treating Physician Dr. Ross?
4. Did the ALJ Err by According Little Weight to the Testimony of Claimant's  
Son Regarding Claimant's Abilities?

## VII. DISCUSSION

### A. The ALJ Erred in Assessing the Plaintiff's Credibility and Testimony Regarding Her Pain Level

Credibility determinations are particularly the province of the ALJ. *Andrews*, 53 F.3d  
at 1043. Nevertheless, when an ALJ discredits a claimant's subjective testimony, he must

01 articulate specific and adequate reasons for doing so. *Greger v. Barnhart*, 464 F.3d 968, 972  
02 (9th Cir. 2006). The determination of whether to accept a claimant's subjective symptom  
03 testimony requires a two-step analysis. 20 C.F.R. § 404.1529; *Smolen*, 80 F.3d at  
04 1281; SSR 96-7p. First, the ALJ must determine whether there is a medically-determinable  
05 impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R.  
06 § 404.1529(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant produces medical  
07 evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to  
08 the severity of symptoms solely because they are unsupported by objective medical evidence.  
09 *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc). Absent affirmative evidence  
10 that the claimant is malingering, the ALJ must provide "clear and  
11 convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick*  
12 v. *Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

13 When evaluating a claimant's credibility, the ALJ "must specifically identify what  
14 testimony is credible and what testimony undermines the claimant's complaints." *Greger*, 464  
15 F.3d at 972 (internal quotation omitted). General findings are insufficient. *Reddick*, 157 F.3d  
16 at 722. The ALJ may consider "ordinary techniques of credibility evaluation" including the  
17 claimant's reputation for truthfulness, inconsistencies in her testimony or between her  
18 testimony and conduct, her daily activities, work record, and testimony from physicians and  
19 third parties concerning the nature, severity, and effect of the symptoms of which the claimant  
20 complains. *Smolen*, 80 F.3d at 1284.

21 The ALJ held that plaintiff's "statements concerning her impairment and its impact on  
22 her ability to work are not entirely credible." AR at 20. This was based on the ALJ's  
23 conclusion that plaintiff had "provided inconsistent information regarding the degree and  
24 severity of her pain symptomatology." AR at 20. The inconsistencies cited by the ALJ include  
25 plaintiff's testimony before the ALJ that plaintiff had pain twenty-four hours every day,  
26 contrasted with plaintiff's statements to her treating doctor regarding fluctuation in her pain

01 levels from visit to visit. AR at 20. The ALJ also noted that during some visits, plaintiff's  
02 treating doctor noted that plaintiff "look[ed] well" or "look[ed] comfortable" and that "at  
03 times [plaintiff] appeared in no apparent distress." AR at 20. Further, the ALJ found that  
04 "objective medical evidence does not support the claimant['s] statements of whole body pain."  
05

06 The ALJ erred by finding the claimant not credible on the basis of her pain allegations.  
07 Relying on the absence of objective medical testimony to discount plaintiff's statements  
08 regarding her subjective pain level was inappropriate. Such an analysis is tantamount to  
09 requiring objective evidence of the *degree* of pain, which is not required by law. As stated  
10 above, once a claimant produces medical evidence of an underlying impairment, the ALJ may  
11 not discredit the claimant's testimony as to the severity of her symptoms solely because they  
12 are unsupported by objective medical evidence. *Bunnell*, 947 F.2d at 343. However, that  
13 appears to be precisely what occurred in this case. Dr. Ross, plaintiff's treating physician,  
14 concluded that the plaintiff was totally disabled. The objective medical evidence evaluated by  
15 Dr. Ross supports plaintiff's testimony regarding her pain. Because there are no allegations  
16 that plaintiff was malingering, the ALJ was required to provide clear and convincing reasons  
17 for rejecting her testimony. *Reddick*, 157 F.3d at 722. The ALJ failed to do so. This error  
18 must be corrected on remand.

19 The ALJ also attempted to support his adverse credibility determination by stating that  
20 "limited daily activities cannot be verified with any reasonable degree of certainty," and that  
21 plaintiff's "statements of . . . preparing and cooking meals, vacuuming, sweeping the floor,  
22 dusting, washing dishes, making the beds, driving, reading and watching television," were  
23 inconsistent with the degree of incapacity that plaintiff alleged. The ALJ's characterization of  
24 plaintiff's daily activities are not consistent with plaintiff's own statements that she was able to  
25 engage in ten minutes of vacuuming, three minutes of sweeping, two minutes of dusting, five  
26 minutes of bed making, and ten minutes of doing dishes, and was unable to do any of those

01 chores on bad days. AR at 88. The ALJ also appears to reject the testimony of plaintiff's son  
 02 as a means to verify plaintiff's daily activities, see AR at 21, despite the fact that plaintiff lives  
 03 with her son and he sees her every day. AR at 345. This issue is discussed in greater detail  
 04 below.

05 Even if plaintiff is able to engage in some basic household activities, that does not mean  
 06 that she is capable of continuously and consistently performing in a structured work  
 07 environment. *See* 20 C.F.R. § 404, Subpt. P., App. 2, § 200.00(c) (defining RFC as "the  
 08 maximum degree to which the individual retains the capacity for *sustained* [work].") (emphasis  
 09 added); *Lester*, 81 F.3d at 833 ("Occasional symptom-free periods are not inconsistent with  
 10 disability."). To this end, "[t]he Social Security Act does not require that claimants be utterly  
 11 incapacitated to be eligible for benefits, and many home activities may not be easily transferable  
 12 to a work environment." *Smolen*, 80 F.3d at 1284. Rather, an ALJ may reject a claimant's  
 13 symptom testimony "if the claimant is able to spend a *substantial* part of her day performing  
 14 household chores or other activities that are transferable to a work setting." *Id.* (emphasis  
 15 added). On remand, the ALJ must reevaluate plaintiff's testimony, and provide clear and  
 16 convincing reasons for rejecting it, should such a conclusion be warranted. In this process, the  
 17 ALJ should carefully determine which of plaintiff's substantial daily activities, if any, are  
 18 transferable to a work setting. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

19       B.     The ALJ Failed to Provide Legally Sufficient Reasons for Rejecting the Medical  
 20           Opinion Evidence of Treating Physician Dr. Ross

21       Relevant medical evaluations of the following physicians were before the ALJ at the  
 22 time of plaintiff's April 1, 2005, disability hearing: treating physician Dr. Martin P. Ross; (AR  
 23 at 130-181) treating physician Dr. Kenneth Leung (AR at 109-114); and two non-examining  
 24 state agency medical consultants. AR at 125, 213.

25       As a matter of law, more weight is given to a treating physician's opinion than to that  
 26 of a nontreating physician because a treating physician "is employed to cure and has a greater  
 opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751.

01 "Likewise, greater weight is accorded to the opinion of an examining physician than a  
02 non-examining physician." *Andrews*, 53 F.3d at 1041; *see also* 20 C.F.R. § 416.927(d)(1).

03 However, under certain circumstances, an examining physician's opinion can be  
04 rejected, whether or not that opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an ALJ  
05 rejects the opinion of a treating or examining physician, the ALJ must give clear and  
06 convincing reasons for doing so if the opinion is not contradicted by other evidence, and  
07 specific and legitimate reasons if it is contradicted. *Reddick*, 157 F.3d at 725. "This can be  
08 done by setting out a detailed and thorough summary of the facts and conflicting clinical  
09 evidence, stating his interpretation thereof, and making findings." *Id.* (citing *Magallanes*, 881  
10 F.2d at 751). The ALJ must do more than merely state his conclusions. "He must set forth his  
11 own interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing  
12 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Such conclusions must at all times  
13 be supported by substantial evidence. *Reddick*, 157 F.3d at 725.

14 In this case, plaintiff's treating physician, Dr. Ross, concluded that plaintiff was totally  
15 disabled due to the pain accompanying her fibromyalgia. AR at 132. Dr. Ross had been  
16 involved in plaintiff's treatment for the three to four years prior to plaintiff's hearing. AR at  
17 330. The ALJ held that although Dr. Ross's opinion regarding plaintiff's diagnosis of  
18 fibromyalgia was credible, his opinion regarding her disability was not. AR at 20, 21. Instead,  
19 the ALJ accepted the opinions of the state medical consultants regarding plaintiff's disability.  
20 AR at 20, 21. In support of his holding, the ALJ stated, "it is not clear that [Dr. Ross] was  
21 familiar with the definition of 'disability' contained in the Social Security Act Regulations."  
22 AR at 21. As a result, the ALJ chose to rely on the opinions of the state medical consultants,  
23 who were not treating physicians. AR at 21.

24 The plaintiff argues that the ALJ rejected the uncontested opinion of Dr. Ross  
25 without a "clear and convincing" or "specific and legitimate" basis. Dkt. No. 12 at 9-11. The  
26 Commissioner disagrees, insisting that Dr. Ross's opinions are controverted by the opinion of

01 Dr. Leung as to the extent of plaintiff's impairment, and argues that the ALJ's reasons for  
 02 rejecting his opinions were specifically outlined and sufficiently legitimate. Dkt. No. 13 at 6.

03 Because this case is being remanded for the reasons detailed above, the Court eschews  
 04 a detailed analysis of the ALJ's justification for discounting the testimony of Dr. Ross. In light  
 05 of the Court's finding that the ALJ failed to properly assess the testimony of the plaintiff as to  
 06 her own symptoms, the ALJs should also reevaluate Dr. Ross's opinions on remand.

07       C.     The ALJ Should Reevaluate the Weight Given to the Testimony of  
 08               Claimant's Son on Remand

09       In order to determine whether a claimant has an impairment, an ALJ may consider lay  
 10 witness sources, such as testimony from family members. 20 C.F.R. § 404.1513(d)(4). If an  
 11 ALJ chooses to discount testimony of a lay witness, he must provide "reasons that are germane  
 12 to each witness." *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). If lay witness  
 13 testimony is diagnostic in nature and conflicts with medical evidence, the ALJ may discount  
 14 such testimony. *Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 1987).

15       The ALJ discounted the testimony of plaintiff's son based on the fact that he may have  
 16 been in a position to benefit from his mother's award of benefits. AR at 21. However, "[i]f  
 17 the desire or expectation of obtaining benefits were by itself sufficient to discredit a claimant's  
 18 testimony, then no claimant (or their spouse, or friends, *or family*) would ever be found  
 19 credible." *Ratto v. Secretary, Dept. of Health and Human Servs.*, 839 F. Supp. 1415, 1429  
 20 (D. Or. 1993) (emphasis added). Here, the ALJ discounted the testimony of plaintiff's son  
 21 based on the close nature of his relationship to the plaintiff. AR at 21. Again, under this logic,  
 22 few third-party witnesses could provide probative testimony. Although a close personal  
 23 relationship may be a germane reason to discount lay testimony, see *Greger*, 464 F.3d at 972,  
 24 the ALJ should balance this consideration with the fact that "[a]n eye witness can often tell  
 25 whether someone is suffering or merely malingering . . . this is particularly true of witnesses  
 26 who view the claimant on a daily basis." *Dodrill*, 12 F.3d at 919. On remand, the ALJ should  
 reevaluate the lay testimony of the plaintiff's son. He has daily contact with his mother, and is

01 in a position to convey a complete picture of his mother's ability to function and care for  
02 herself at home.

## VIII. CONCLUSION

4 Because the ALJ erred by improperly discrediting plaintiff's subjective symptom  
5 complaints, by improperly rejecting the opinion of Dr. Ross, and by failing to provide legally  
6 sufficient reasons for discounting the testimony of plaintiff's son, this case should be  
7 REVERSED and REMANDED for further proceedings not inconsistent with this Report and  
8 Recommendation. In particular, the ALJ should reevaluate plaintiff's subjective pain  
9 testimony, reassess and give proper weight to the testimony of plaintiff's son and to that of Dr.  
10 Ross, reevaluate plaintiff's RFC, and reassess plaintiff's credibility. To the extent that the  
11 plaintiff's impairments and/or limitations are modified on remand, the ALJ should call a  
12 vocational expert at step five, and propound a hypothetical to the VE that incorporates the  
13 medical evidence on record. Specifically, the ALJ should ask the VE to provide testimony  
14 concerning the full vocational impact of all plaintiff's physical impairments, and to clarify the  
15 effect of the assessed limitations on plaintiff's occupational base. A proposed order  
16 accompanies this Report and Recommendation.

DATED this 30th day of July, 2007.

*James P. Donohue*  
JAMES P. DONOHUE  
United States Magistrate Judge